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No. 82-1110

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC., YELLOW FREIGHT SYSTEMS, INC., CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, ILLINOIS-CALIFORNIA EXPRESS INC., IML FREIGHT INC., PACIFIC INTERMOUNTAIN EXPRESS CO., T.I.M.E.—D.C. INC., CONSOLIDATED COPPERSTATE LINES, GARRETT FREIGHT LINES, INC., NAVAJO FREIGHT LINES, INC., N.W. TRANSPORT SERVICE, INC., RINGSBY TRUCK LINES, INC., RIO GRANDE MOTOR WAY, SALT CREEK FREIGHT WAYS, TRANSCON LINES, UNITED BUCKINGHAM FREIGHT LINES AND WESTERN GILLETT, INC.,

Petitioners,

vs.

CLIPPER EXXPRESS,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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[1] Petitioners' parents, subsidiaries and affiliates are listed on page ii of the Petition.

INTRODUCTION

Nothing demonstrates the need for this Court to review the Ninth Circuit's decision better than Clipper's attempt to defend it, not on its merits, but rather on the basis of arguments that the Ninth Circuit itself did not accept. We address Clipper's arguments in order.

ARGUMENT

I. Resolution of the Issues Raised In The Petition Will Dispose of This Case

First Clipper argues that the Petition should be denied because the issues it raises are not dispositive of this case. (R.B. 8-9) Clipper says that even if this Court were to hold that RMMTB's petitioning activity was protected by the First Amendment, there would still have to be a trial because the Court of Appeals "validated" an additional claim by Clipper "that litigation prosecuted in furtherance of an antitrust violation may itself constitute an independent violation." (R.B. 8, n.6)

But Clipper made no such claim, and the Court of Appeals certainly did not "validate" any such claim. As the Court of Appeals stated, Clipper's additional liability theory was that "the defendants engaged in a rate fixing conspiracy, part of which involved defendants' protests to the ICC, and that *this conspiracy constitutes a separate violation of the antitrust laws independent of any petitioning activity that might enjoy Noerr immunity.*" (App. A, p. A-34)[2] That is the claim the Court of Appeals "validated." (*Id.*, pp. A-34-A-39). Far from holding that petitioning activity "in furtherance of [that conspiracy] may itself constitute an independent violation," the Court of Appeals expressly acknowledged this Court's holding in *Pennington* that "*such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.*" 381 U.S. 657 at 670; App. A, p. A-38.[3]

In any event, "validation" of Clipper's "rate fixing conspiracy" theory of liability would not save Clipper's lawsuit if

[2] All emphasis herein is added unless otherwise indicated.

[3] If Clipper were correct about what the Ninth Circuit held, the decision would conflict with *Pennington* in this respect as well, and that would be all the more reason why this Court should review it.

Clipper's other claims fell because the only conduct that Clipper claimed caused it any injury was RMMTB's protest of the Tariff 55 series. This is clear from the Court of Appeals' description of Clipper's damage claim (with which Clipper expressly agrees, R.B. 9):

> Clipper's damage claim rests on three distinct theories: (1) Once Clipper published and defendants protested the $1056 rate, Clipper was effectively barred from publishing its $842 rate until the investigation of the $1056 rate was resolved in Clipper's favor .... Clipper seeks the damages resulting from the two-year delay in publishing the $842 rate; (2) Clipper seeks to recover costs incurred in defending against defendants' sham protests; and (3) the ICC investigation of the $1056 rate, caused by defendants' protests, placed a 'cloud' on the legality of that rate during the time it was under investigation. (App. A, p. A-39)[4]

Thus, if this Court agrees with the District Court and holds that the First Amendment protects RMMTB's protest of the Tariff 55 series, this case will have to be dismissed in its entirety.

However, even if this were not so, the writ still should be granted. Just last year the Court granted certiorari to review an interpretation of the antitrust laws that was not essential to the outcome of the litigation "[b]ecause the Court of Appeals' decision present[ed] an important issue concerning the interpretation of the antitrust laws ...." *American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 102 S.Ct. 1935, 1942 (1982).

That is clearly true here. The Court of Appeals' decision on the "sham" exception raises important and recurring antitrust and First Amendment issues. Nearly thirty decisions (many of them confused and conflicting) involving these issues have been rendered during the last two years alone. (Petition

[4] Clipper implies that it also sought to recover damages for other allegedly conspiratorial conduct. (R.B. 9, n.7, 11) Clipper neglects to tell the Court that it specifically either abandoned or admitted that it could show no damages from any such conduct (C.T. 747-48, 776; 1786 ll. 8-20, 1787 ll. 11-15; Docket No. 529, C.T. 2002, p. 47), and that it repeatedly stated that "the gravamen of this action is defendants' repeated and baseless protest of Tariff 55." (Docket No. 529, C.T. 2002, p. 7) As the Ninth Circuit said: "There is one basic Tariff—Tariff 55—involved here." (App. A, p. A-19, n.19).

pp. 10-12; App. F)[5] Additionally, the Court of Appeals' decision in this case takes the "sham" exception farther, at the expense of First Amendment values, than any other decision ever has; it clearly conflicts with decisions both of this Court and of the other courts of appeal. (Petition pp. 10-14) Under these circumstances, certiorari is entirely appropriate.

II. The Court of Appeals' Decision On The "Sham" Exception Is Important To The First Amendment And The Antitrust Laws And Conflicts With Decisions of This Court And Other Courts of Appeals.

Second, Clipper contends that the Petition should be denied because it seeks an "advisory opinion" on merely "hypothetical" issues. Clipper portrays this case as involving (1) "a veritable blizzard of protests" (R.B. 10-11); (2) as to which there was "far more 'objective evidence' of 'baselessness' than each protest's lack of success" (R.B. 12-13); (3) and where "the antitrust plaintiff did not need . . . access to obtain prior approval from a regulatory body." (R.B. 14-15) Therefore, Clipper says, the Court of Appeals' application of the "sham" exception is supported by this Court's decisions in *Trucking Unlimited, Otter Tail,* and *City of Lafayette,* and does not conflict with any other Court of Appeals' decision. (R.B. 12-15)

That is wishful thinking. The decision Clipper has chosen to defend bears no resemblance to the one actually rendered by the Court of Appeals.

A. Single Protest.

The Court of Appeals acknowledged that, practically speaking, there was just one protest involved in this case:

> There is one basic Tariff—Tariff 55—involved here. During the course of the investigation, however, Tariff 55 was modified by Clipper many times. After each modification

[5] Indeed, three more Court of Appeals' decisions interpreting the "sham" exception in different ways have been published since the Petition was filed a month and a half ago. *See, Grip-Pak, Inc.* v. *Illinois Tool Works, Inc.,* 1982-83 Trade Cases ¶ 65,058 (7th Cir. 1982); *MCI Communications Corp.* v. *American Tel. & Tel. Co.,* 1982-83 Trade Cases ¶ 65,137 (7th Cir. 1983) and *Coastal States Marketing, Inc.* v. *Hunt,* 1982-83 Trade Cases ¶ 65,140 (5th Cir. 1983).

> the defendants lodged a new protest. *Each protest was necessary to preserve the initial protest or else the newly revised Tariff 55 would go into effect, mooting the prior protest.* (App. A, p. A-19, n.19)

Therefore, the Court of Appeals assumed "that defendants' acts constituted *one* protest . . . ." App. A, p.p. A-18-A-19. Its holding in this regard could not be clearer: "*we hold that a single suit, or in this case a single protest, is sufficient to invoke the sham exception.*" (App. A, p. A-23)

B. Lack of Success as Proof of Baselessness.

Similarly, the Court of Appeals did not pretend, as does Clipper, that there was any objective evidence of "baselessness" besides the protest's lack of success. To the contrary, the Court of Appeals considered lack of success to be the *only* objective evidence, but held that this alone was enough:

> Here, defendants' protests to Clipper's reduced rates were unsuccessful. This, combined with the assumed facts as to the defendants' intent, is enough to prevent the defendants from being cloaked with *Noerr* immunity as a matter of law. (App. A, p. A-18) [6]
>
> * * *
>
> Indeed, the fact that defendants lost all protests establishes a sufficient showing of baselessness for the purposes of a summary judgment motion. (App. A, p. A-23). [7]

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[6] As the Court of Appeals states, petitioners admitted for purposes of the summary judgment motion that "the object behind each of the protests was just what Clipper says it was—that the defendants who filed them were simply trying to eliminate or destroy competition." (App. A, p. A-11) Petitioners did so because, as the court below acknowledged, "[g]enuine efforts to induce governmental action are shielded by *Noerr* even if their express and sole purpose is to stifle or eliminate competition." (App. A, p. A-17). The Court of Appeals, however, somehow converted this admission into acceptance of *all* of Clipper's allegations of subjective intent, which it clearly was not. The Court of Appeals then compounded its error by holding that defendants' lack of success, combined with "the assumed facts as to defendants' intent is enough to prevent the defendants from being cloaked with *Noerr* immunity as a matter of law." (App. p. A-18)

[7] Clipper tries to supplement the Court of Appeals' decision by arguing that it submitted a number of affidavits containing evidence of baselessness. (R.B. 13) However, those affidavits were submitted after summary judgment was entered and after the time for a motion to vacate the judgment had expired. (App. A, p. A-6) Thus, they were "late-filed" and the Court of Appeals expressly did not consider them. (App. A, p. A-10, n.13) In any

(Footnote continued on following page)

C. Access Denial.

Nor did the Court of Appeals agree with Clipper that this is a case like *Otter Tail* and *City of Lafayette*, where "the antitrust plaintiff did not need ... access to obtain prior approval from a regulatory body." (R.B. 15) To the contrary, the Court of Appeals stated: "The ICC also retains power to suspend any new rate sua sponte ...." (App. A, p. A-3). Thus, the Court of Appeals acknowledged that even if RMMTB had not protested Tariff 55—which both Clipper and the ICC described as "novel and experimental"—"there is no certainty the rate would have been approved." (App. A, p. A-42)

The Court of Appeals could not properly have concluded otherwise. Clipper's assertion that it "merely had to publish its tariffs and they would have become effective automatically absent petitioners' sham protests" (R.B. 14), is dead wrong. The Interstate Commerce Act expressly gave the ICC the power to investigate and suspend rates "on its own initiative." (49 U.S.C. § 1006(e) recodified as 49 U.S.C. § 10708(a)), and during the years 1973-1977, for example, the ICC exercised that power over 250 times. (C.T. 2113-14) Thus, to use Clipper's words, this is a case where "the antitrust plaintiff needed prior access to obtain prior approval from a regulatory body—as in *Trucking Unlimited* ...." (R.B. 15) As Clipper admits, in such cases "the courts have followed that precedent and required some showing of 'access denial'." (R.B. 15)[8]

In short, the Court of Appeals held that petitioners' First Amendment right to protest was lost although (1) only one protest was involved; (2) the tariff protested was admittedly novel and experimental; (3) the protest's lack of success was the only objective evidence to support Clipper's allegation that

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(Footnote continued from preceding page)

event, the affidavits contained only conclusory allegations by paid witnesses arguing that RMMTB submitted false information to the ICC *after* the ICC began its investigation of Tariff 55.

[8] Indeed, the regulatory setting is in this sense exactly like the one in *Trucking Unlimited*. There, applications for operating authority could be granted without hearing or investigated and denied either upon protest or upon the initiative of the California Public Utilities Commission. (Calif. Pub. Utilities Code §§ 1063-64) However, as discussed in the Petition, access-barring or something akin to it has been required even where the antitrust plaintiff did not need access to obtain prior approval from a regulatory body. (Petition, p. 12, App. F, pp. F-59-F-63).

it was "baseless"; and (4) the protest did not bar anyone's access to the administrative process in circumstances where access-barring has been required.

Plainly, this holding is important to both the antitrust laws and the First Amendment. Just as plainly, this holding conflicts with decisions of this Court and other Courts of Appeals. Indeed, Clipper does not contend otherwise. Certiorari should be granted to review and reverse this holding.

III. The Court of Appeals' Decision On Clipper's "Fraud Claim" Is Important To The First Amendment And The Antitrust Laws And Conflicts With Decisions Of This Court And Other Courts Of Appeals

Third, Clipper argues that the issue presented by the Petition with respect to its "fraud" claim is likewise hypothetical. Clipper argues that the record showed that defendants filed "fraudulent protests" that "caused the ICC to investigate Tariff 55 . . . ." (R.B. 3, 16), and therefore that its claim satisfies the "*Walker Process* doctrine" and *Trucking Unlimited.* (R.B. 17-20)

Again, however, this is not how the Court of Appeals saw the case. Unlike Clipper, it did not suggest that there was any evidence that the ICC's investigation of Tariff 55 was caused by misrepresentations by defendants. To the contrary, it assumed that "the ICC began its investigation into Clipper's Tariff 55 *before* defendants made their fraudulent representations." (App. A, p. A-31, n.33).[9] It held that "the *Walker Process* doctrine" applied anyway:

> The doctrine is not concerned with whether the body intended to be influenced by the information is ultimately defrauded; a cause of action is established so long as the

[9] The Ninth Circuit speculated that the alleged "fraud may have resulted in a longer, more in depth, investigation," but it did not suggest that there was any evidence of this, and there was not. (App. A, p. A-31, n.33) The investigation lasted only six months; the two year period referred to by Clipper and the Ninth Circuit included the time for appeals. (Petition, pp. 4-5) *Neither the investigation nor the appeals prevented any of Clipper's rates from going into effect on schedule. (Id.)*

elements of an antitrust claim are alleged and the violation is executed through fraudulently supplying information. (App. A, p. A-33)

The Court of Appeals did not allude to any evidence that the ICC's investigation was caused by petitioners' alleged misrepresentations because there is none, and Clipper did not even claim there was until its Brief to this Court. (R.B. 3) Clipper's belated attempt to support and recast the Court of Appeals' holding to make it defensible is a meritless afterthought.[10] The Court of Appeals' holding is clear, and it cannot be wished away. That holding is inconsistent with both *Walker Process* and *Trucking Unlimited.*

In *Walker Process,* but for the defendant's misrepresentations the patent would not and could not have issued. (Petition, p. 16)[11] In *Trucking Unlimited,* the Court recognized that opponents in litigation frequently charge each other with fraud and therefore held that there must be an "illegal result" before the "sham" exception can be applied to vitiate *Noerr* immunity.

In *Trucking Unlimited* the Court also held that the First Amendment protects statements made in a legislative proceeding regardless of their character, and a long line of this Court's decisions squarely hold that ICC rate proceedings like the one involved here are legislative. (Petition, p. 16; see proposed Amicus Curiae Brief of American Trucking Associations, pp. 6-8) Thus, the Court of Appeals' assumption and Clipper's argument that the proceeding was adjudicatory (App. A, pp. A-30-A-31; R.B. 19) collide head-on with controlling rulings of this Court.

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[10] Indeed, as Clipper's request for judicial notice makes clear, the "evidence" on which Clipper relies is not even in the record (R.B. 4, n.2), and its arguments in this regard are absurd. They are based on a comparison of Clipper's "truckload" FAK rate applicable only to shipments exceeding 30,000 pounds with RMMTB's "truckload" shipments which varied from 10,000 to 40,000 pounds, and without even considering what commodities were involved—a classic comparison of apples and oranges. Moreover, they come down to the claim that RMMTB misrepresented common carrier charges—*i.e.,* rates—to the ICC, the very agency with which the tariffs containing those rates were filed.

[11] Clipper's statement that "the ICC's position in considering a protest is identical to that of the Patent Office in considering a patent application" (R.B. 18), ignores our demonstration that a patent proceeding is unique in its need for protection against fraud. (Petition, pp. 14-15)

Finally, the Court of Appeals' decision, which allows Clipper to get to trial on its fraud claim without even showing the "illegal result" required by this Court in *Trucking Unlimited,* is of critical importance to the antitrust laws and the First Amendment. As another Ninth Circuit panel has asked:

> [W]hat competitor, knowing that its participation in administrative proceedings might result in expensive and burdensome litigation, which would drag on through the discovery stage at least, would not thereby feel pressured to forego presenting its views to the government?

Franchise Realty Interstate Corp. v. *San Francisco Local Joint Executive Board of Culinary Workers,* 542 F.2d 1076, 1082 (9th Cir. 1976), *cert. denied,* 430 U.S. 940 (1977). The answer is "no competitor." The chilling effect of the Court of Appeals' decision is undeniable. This court should review and reverse this decision.

IV. The Court of Appeal's Decision On The Keogh Doctrine Is Important To The Proper Roles of Antitrust Courts And Rate-Setting Agencies, As Well As To Proper Administration Of The Treble Damage Remedy, And It Conflicts With Decisions of This Court and Decisions From Other Circuits.

Finally, Clipper contends that this Court should not review the Court of Appeals' application of the *Keogh* doctrine because the doctrine only applies to "disputes between regulated industries and their customers", and because the Court of Appeals' decision in this regard is "insignificant." (R.B. 20-22) Clipper is wrong on both counts.[12]

To begin with, Clipper's view of *Keogh* was not the Court of Appeals' view. To the contrary, the Court of Appeals recognized that in *Keogh* this Court was not concerned only

[12] Clipper also suggests that this Court may have overruled *Keogh* in *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213 (1966). (R.B. 20, n.18) There is nothing to this contention. *Carnation* did not address any damage issues at all, and did not so much as mention *Keogh.* However, if there were any question about *Keogh's* continued validity, that is a question this Court should address on the merits, by reviewing this case.

about preserving the uniformity of rates between customers of a regulated defendant; it was also concerned about allowing an antitrust court "to speculate on the level [at which] the rate would have been set by carriers and approved by the ICC absent the conspiracy, thereby assuming what ICC action would be." (App. A, p. A-41) Such speculation is implicated just as much by this litigation as by disputes between regulated industries and their customers, and the Court of Appeals did not pretend otherwise. Indeed, the Court of Appeals admitted that Clipper's principal damage claim did require precisely such speculation:

> Here the allegations indicate that Clipper would have filed an $842 rate, and the subsequent ICC approval *suggests* that rate *might* have been approved two years earlier. *Of course, there is no certainty the rate would have been approved. The speculation involved in the instant case,* however, in no way approaches the degree of speculation disallowed in *Keogh.* (App. A, pp. A-41-A-42)

Thus, by its own analysis, the Court of Appeals' decision conflicts with *Keogh.* Clipper simply has no answer to this problem.[13]

Indeed, Clipper's own brief establishes that the importance of the Ninth Circuit's holding regarding *Keogh* transcends this case. Clipper admits that *Keogh* has been rigorously applied

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[13] Furthermore, while the Court of Appeals did not acknowledge it, Clipper's only other damage claim of consequence likewise required speculation as to how the ICC would have acted in circumstances not presented to it. As the Court of Appeals stated, Clipper also sought "to recover for profits lost because of the 'cloud' on Clipper's rate while it was under investigation." (App. A, p. A-41) This claim presupposed that the ICC would not have investigated Clipper's "novel and experimental" rate, had it not been protested. Yet, as the Ninth Circuit elsewhere acknowledged, the ICC had the power to suspend any rate *sua sponte.* (App. A, p. A-3) Thus, this claim is based on the assumption that it would not have done so. Clipper's two claims that depended on speculation as to ICC action accounted for virtually all of Clipper's $30 million damage claim. Consequently, the Ninth Circuit's application of the *Keogh* doctrine was of substantial importance to this litigation.

Clipper's only other damage claim was "for the costs of defending against the protests." (App. A, p. A-41) However, Clipper admitted that this defense was conducted by its own Vice President-Traffic and that it involved only 72 hours of additional management time. (Stelzer Deposition at 183-189, 368, Ex. 1)

both by this Court and lower courts. (R.B. 21) It simply tries to distinguish those cases on the ground that they "involved disputes between regulated industries and their customers." *(Id.)* Since the Court of Appeals refused to accept that distinction, it is clear that there is a significant conflict between the Ninth Circuit's application of *Keogh* and the way it has been applied by this Court and other Circuits. This conflict is not dispelled by Clipper's claim that *some* cases from other Circuits support the Ninth Circuit's analysis. *(Id.)* That only underscores the significance of the conflict and the need for this Court to clarify the law.[14]

CONCLUSION

For the reasons stated here and in the Petition, the writ should be granted.

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[14] Nor is the conflict dispelled by the line of cases that allow an antitrust plaintiff reasonable latitude in proving the *amount* of its damages. (R.B. 22) As this Court has stated:

> [T]here is a clear distinction between the measure of proof necessary to establish the *fact* of damage, and the measure of proof necessary to enable the jury to fix the *amount*. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong . . . ."

Story Parchment Co. v. *Patterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931) *See also MCI Communications Corp.* v *American Tel. & Tel. Co.*, 1982-83 Trade Cases ¶ 65,137 at p. 71, 415 (7th Cir. 1983).